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6 UNITED STATES BANKRUPTCY COURT
7 NORTHERN DISTRICT OF CALIFORNIA
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9 In re:) Bankr. No. 98-34249-STC
10 ETSUKO TSURUKAWA,) Chapter 7
11 fdba HIGH INNOVATION,)
12 Debtor.)

13 _____)
14 NIKON PRECISION INC.,) **Adv. Proc. No. 98-3501-TC**
15 Plaintiff,) (Consolidated with
16 vs.) Adv. Proc. No. 99-3175-TC)

17 ETSUKO TSURUKAWA, fdba HIGH) **MEMORANDUM DECISION**
18 INNOVATION and TAKEHIKO,) **UPON REMAND**
19 Defendant.)

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21 This court held a hearing on November 9, 2001 to make
22 additional determinations upon remand from the Ninth Circuit
23 Bankruptcy Appellate Panel (BAP). Gary M. Kaplan and Anthony de
24 Alcuaz appeared for Plaintiff Nikon Precision, Inc. (NPI).
25 John Chu appeared for Defendant Etsuko Tsurukawa (Etsuko). Upon
26 due consideration, the court finds that Etsuko's husband, Takehiko
27 Tsurukawa, acted as Etsuko's agent in perpetrating the wrongful
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1 acts in question, and that judgment should once again be entered
2 for NPI, determining Etsuko's liability to NPI to be
3 nondischargeable.

4 **BACKGROUND**

5 Takehiko Tsurukawa (Takehiko) worked for NPI. He and Etsuko
6 also owned a business known as High Innovation. Takehiko caused
7 NPI to refer certain NPI repair work to High Innovation, without
8 disclosing to NPI his interest in High Innovation. High Innovation
9 caused the repair work to be performed by a third party, then
10 charged NPI more than High Innovation paid that third party. After
11 NPI discovered this scheme, Takehiko and Etsuko stipulated to entry
12 of a state-court judgment in the amount of \$ 2,000,000. The
13 judgment contained detailed stipulations of fact regarding the
14 scheme and Takehiko's role in that scheme.

15 This court previously entered a judgment determining that
16 neither Takehiko nor Etsuko could discharge this judgment in their
17 chapter 7 bankruptcy case. I determined on NPI's motion for
18 summary judgment that the stipulated judgment established that
19 Takehiko had obtained funds from NPI under false pretenses, and
20 that under principles of collateral estoppel, NPI was entitled to
21 a judgment that Takehiko's liability was nondischargeable pursuant
22 to 11 U.S.C. § 523(a)(2). Because the stipulated judgment did not
23 specify the role Takehiko's wife Etsuko played in the fraudulent
24 scheme, I held a trial to determine whether her liability under the
25 judgment was also nondischargeable. At the end of the trial, I
26 determined that Takehiko's wrongful conduct should be attributed to
27 Etsuko, because (1) the fraud occurred in the ordinary course of
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1 business of High Innovation, (2) Etsuko participated significantly
2 in that business, (3) Etsuko benefitted from the wrongful conduct,
3 and (4) Etsuko had reason to suspect that Takehiko was engaged in
4 wrongful conduct.

5 The Bankruptcy Appellate Panel (BAP) reversed the judgment
6 with respect to Etsuko. Tsurukawa v. Nikon Precision, Inc. (In re
7 Tsurukawa), 258 B.R. 192 (Bankr. 9th Cir. 2001). The BAP held that
8 this court applied the wrong legal standard in determining whether
9 Etsuko should be held responsible for Takehiko's wrongful acts.
10 For the purpose of determining whether a debt is nondischargeable,
11 the BAP held, one spouse may be held vicariously responsible for
12 the wrongful acts of the other spouse only if the first spouse
13 committed the wrongful acts as agent for the second spouse. Id.
14 at 196-98. The BAP directed this court to determine whether Etsuko
15 was vicariously responsible for Takehiko's acts under the correct
16 legal standard and, if not, whether Etsuko knowingly participated
17 in the fraudulent scheme. Specifically, the BAP stated, "[w]e
18 reverse and remand to the bankruptcy court for a determination as
19 to whether (1) an agency relationship existed between Debtor and
20 Takehiko or (2) Debtor had the requisite fraudulent intent to
21 deceive Nikon." Id. at 198.

22 **AGENCY**

23 Under California law, "[a]n agent is one who represents
24 another, called the principal, in dealings with third persons.
25 Such representation is called agency." Cal. Civ. Code § 2295.
26 The Restatement defines agency in a similar way. "Agency is the
27 fiduciary relationship that arises when one person (a 'principal')

1 manifests assent to another person (an 'agent') that the agent
2 shall act on the principal's behalf and subject to the principal's
3 control, and the agent manifests assent or otherwise consents so to
4 act." Restatement (Third) Agency, § 101 (Tentative Draft No. 2,
5 2001).

6 Partners are agents for each other. "All partners are bound
7 by the fraud of one acting within the scope of his authority in a
8 partnership transaction with innocent third parties, in the same
9 way in which a principal is responsible for fraud of his authorized
10 agent." 9 Witkin, Summary of California Law, Partnership §40 at
11 435 (9th ed. 1989) (citing Zemelman v. Boston Ins. Co., 4 Cal. App.
12 3d 15, 18 (1970)). Under California law, the governing factor in
13 determining whether co-owners are partners is whether they intend
14 to operate a business together.

15 The intention of the parties to carry on as
16 co-owners a definite business is ultimately
17 the test of partnership. If they associate
18 together and carry on a business, a partnership
19 is normally created. It is immaterial that
20 they do not so designate the relationship, or
21 do not know they are partners, for the intent
22 may be implied from their acts.

23 Id. § 24 at 423.

24 Applying these standards, I find that Takehiko acted as
25 Etsuko's agent in performing the tortious acts at issue in this
26 lawsuit.

27 First, finding Etsuko to be a principal and Takehiko to be
28 her agent is consistent with what Etsuko represented to the public
to be her role in High Innovation. Etsuko signed many documents
submitted to public agencies in which she represented that she was
the sole owner of High Innovation. Those documents include sales

1 tax returns filed with the California State Board of Equalization,
2 forms submitted to the California Franchise Tax Board, and a
3 fictitious business name statement submitted to the City and County
4 of San Francisco. Documents submitted to public agencies must be
5 presumed to have been completed and submitted in good faith, and it
6 must therefore be presumed that the documents at issue here
7 accurately reflected Etsuko's role in the business. Pearson v.
8 Norton, 230 Cal. App. 2d 1, 12 (1964).

9 Second, I would find an agency relationship between unmarried
10 persons who had the same economic relationship as Etsuko and
11 Takehiko. If A and B are unmarried, A holds herself out to the
12 public as sole owner of a business, B conceived the business and
13 makes all business decisions, A deposits and writes checks for the
14 business, and A and B share the profits of the business, the most
15 natural conclusion is that B manages A's business as A's agent, or
16 that A and B are partners.^{1/} Such are the facts here. Takehiko
17 conceived the idea for the business and managed all aspects of the
18 business. Etsuko performed numerous functions for the business,
19 including signing the lease for the company's Judah Street
20 premises, signing the forms used to open a company bank account at
21 Bank of America for which she was originally the sole signatory,
22 signing the application for a company credit card, writing many

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24 ^{1/} To the extent it is inappropriate to consider Etsuko a
25 principal because Takehiko has a community property interest in
26 High Innovation, it is appropriate to consider Etsuko and Takehiko
27 partners. As noted above, co-ownership becomes a partnership when
28 the parties intend to conduct business together. The significant
functions that Etsuko performed for the company constitute
objective evidence that she intended to conduct business with her
husband, and was not merely a passive co-owner.

1 checks on the company account, depositing many checks payable to
2 High Innovation, and handling some of the maintenance and repairs
3 regarding the Judah Street premises. The evidence indicates that
4 both Etsuko and Takehiko consented to perform the respective roles
5 described above.

6 I recognize that one must be careful with this type of
7 analysis. "[T]he assumption of [business functions] by a spouse
8 may not carry the weight that such conduct on the part of a
9 stranger would imply" Id. at 12. Thus, it is not
10 appropriate to find an agency relationship in every instance in
11 which a spouse takes bare legal title to business property held for
12 the benefit of the couple, or where one spouse performs minor
13 services for a business run by the other spouse. It is also
14 inappropriate to find a partnership in every instance in which
15 spouses share the profits of an enterprise, because under community
16 property law a husband and wife generally share the profits of a
17 business managed by either spouse. This is not such a case. By
18 holding herself out as sole owner of High Innovation and by
19 performing substantial activities for the business, Etsuko assumed
20 an active role in High Innovation that goes beyond merely holding a
21 community property interest in her husband's business and
22 performing minor services for that business.

23 The most difficult question to answer in determining whether
24 Takehiko acted as Etsuko's agent is whether Etsuko had the
25 requisite degree of control. She clearly did not control the
26 business in the most common sense of the word, in that she did not
27 control the day-to-day management of the business. Exercise of
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1 such a degree of control is not necessary. "The control or right
2 to control needed to establish agency may be very attenuated and
3 there may even be an understanding between the master and servant
4 that the employer shall not exercise control." Love v. Smith (In
5 re Smith), 98 B.R. 423, 426 (Bankr. C.D. Ill. 1989) (citing
6 Restatement (Second) Agency § 220 comment d).

7 In Smith, the debtor's husband wanted to open a used car
8 dealership. He couldn't get the requisite license because he was
9 a convicted felon. The debtor obtained the license and took
10 ownership of the business and its bank account in her name, but
11 did not participate in management of the business. The husband
12 converted the proceeds of a used car left on consignment. The
13 bankruptcy court found the debtor liable for her husband's tort,
14 and held the resulting debt nondischargeable, on the basis that
15 the debtor's husband had acted as her agent. With respect to the
16 question of control, the court stated:

17 Although the testimony indicated that Bob Smith
18 ran the business . . . and that Pamela K. Smith
19 did not participate in any of the decision
20 making or management of the business, she did
21 exercise control over Bob Smith because the
license was in her name. She was the only
person authorized to sign checks, and she
actually enabled Bob Smith to operate the
business.

22 Id. at 426.

23 The type and degree of control present here are similar to
24 that found sufficient in Smith. In Smith, the wife's represen-
25 tation of ownership was necessary to satisfy a *legal requirement*
26 for continued operation of the business. The husband could not
27 legally operate the dealership without a license that only his wife

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1 could obtain. The wife exercised control in that her husband could
2 operate the business only so long as she agreed to hold herself out
3 as the sole owner of the dealership. In the present case, Etsuko's
4 representation of ownership satisfied a perceived *practical*
5 *requirement* for the execution of Takehiko's fraudulent scheme.
6 Takehiko apparently believed that keeping his name off the business
7 would make it harder for his employer to discover his self-dealing.
8 Etsuko retained control over Takehiko in that he could pursue this
9 concealment strategy only so long as Etsuko agreed to hold herself
10 out as the sole owner of the business.

11 The decision of the BAP prominently noted various facts
12 regarding Etsuko: that she is agoraphobic and only rarely leaves
13 her home; that she spends the majority of her time caring for three
14 children, one of whom is autistic; and that she is not financially
15 sophisticated. Tsurukawa, supra, 258 B.R. at 193 n.3. I believe
16 these facts have only a limited bearing on the question whether
17 Takehiko was Etsuko's agent or partner. The facts noted above
18 indicate that Etsuko likely did not spend much time thinking about
19 the business of High Innovation, and that she may not have
20 understood fully that the profits of the company were derived from
21 a fraud upon NPI.^{2/} These facts do not indicate that Etsuko did not
22 agree to act as the principal of High Innovation, that she did not
23 understand that she was representing herself to the public as the
24 owner of the company, that she did not perform the other functions
25 for High Innovation previously noted, or that she did not undertake

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27 ^{2/} At the same time, the evidence indicates she did have
28 reason to suspect that her husband was defrauding NPI. See
Transcript from December 13, 1999 proceedings at 5-8.

1 these functions voluntarily. In short, the facts noted by the BAP
2 make Etsuko a sympathetic defendant and create some doubt as to
3 whether Etsuko intended to defraud NPI, but do not outweigh the
4 facts that indicate that Etsuko was a principal or partner in High
5 Innovation.

6 Etsuko argues that because of a recent change of law, she may
7 not be held responsible for acts committed by her husband even if
8 he performed those acts as her agent. She notes that the BAP
9 relied upon In re Cecchini, 780 F.2d 1440 (9th Cir. 1985) in
10 holding that a principal may be vicariously responsible for the
11 tortious acts of an agent. She argues that this doctrine is no
12 longer applicable, because the Ninth Circuit overruled Cecchini
13 after the BAP issued its opinion in this case. This argument is
14 unpersuasive. The Ninth Circuit decision in question, In re
15 Pecklar, 260 F.3d 1035 (9th Cir. 2001), discussed the portion of
16 Cecchini that addressed whether a tort is "willful and malicious,"
17 not the portion of Cecchini that addressed vicarious responsibility
18 for acts of an agent. Id. at 1037-38.

19 In my previous decision, I found that Takehiko's tortious acts
20 were within the ordinary course of the business of High Innovation,
21 and that Etsuko benefitted from Takehiko's tortious acts. Takehiko
22 thus acted within the scope of his agency in performing the
23 tortious acts in question, and it is therefore appropriate to hold
24 Etsuko responsible for those acts in determining the discharge-
25 ability of her liability to NPI.

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1 **FRAUDULENT INTENT**

2 In light of the determination that Takehiko acted as Etsuko's
3 agent when he defrauded NPI, it is unnecessary to determine whether
4 Etsuko herself intended to defraud NPI.

5 **CONCLUSION**

6 Judgment will be entered determining Etsuko's liability to
7 NPI under the stipulated judgment to be nondischargeable pursuant
8 to 11 U.S.C. § 523 (a) (2).

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12 Dated: January 14, 2002

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Thomas E. Carlson
United States Bankruptcy Judge

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